

MVP: Winston & Strawn's Jeffrey Kessler

By Ryan Boysen

Law360 (October 16, 2020, 4:39 PM EDT) -- Jeffrey Kessler of Winston & Strawn LLP continued battering down the legal ramparts of the NCAA's "amateurism" rules with a major victory in the Ninth Circuit this year, while helping the NFL, MLB and NBA player unions navigate the COVID-19 pandemic, securing his spot as one of Law360's 2020 Sports & Betting MVPs.

HIS BIGGEST ACCOMPLISHMENT THIS YEAR:

Kessler said if he has to choose just one legal victory to gloat over this year, it would be the Ninth Circuit's decision in May to uphold a landmark 2019 ruling that found many of the National Collegiate Athletic Association's rules that prevent college players from being paid violate antitrust laws. The NCAA has since asked the U.S. Supreme Court to take up the case.

The 2019 ruling blew a major hole in the NCAA's "amateurism" argument, which essentially posits that college sports fans would stop watching if college players drew a salary like their major league peers, and in any case they're already being compensated by receiving a free education. Those arguments have for decades allowed the NCAA to fend off legal attacks on a business model where unpaid athletes generate billions of dollars each year for their colleges and the NCAA, which many critics see as blatantly exploitative.

The 2019 ruling only entitled college players to a few thousand dollars in additional annual benefits, but it nonetheless marked a turning point because it exposed several cracks in the NCAA's amateurism arguments. Pressure for broad reform of the NCAA's business model from activists, politicians and the players themselves has only increased since then.

While the Ninth Circuit declined to blow up the NCAA's amateurism rules entirely on appeal, as Kessler and his co-counsel had urged, the appeals court's decision to leave the 2019 ruling undisturbed nonetheless represents a major step forward, Kessler said.

"We believe that the very persuasive set of findings by [U.S. District Judge Claudia Wilken] in her 2019



opinion had a really positive influence on things like California's" push to let college athletes get paid for the use of their names, images and likenesses, Kessler said. "That then set off a chain reaction that's expanded to other states, so I think her ruling was a milestone in that overall movement. And the Ninth Circuit upholding it is a major victory for the same reason."

Kessler said that with the momentum now firmly on their side, he expects to eventually see college athletes getting paid, at least in revenue-generating sports like football and basketball.

"I think we will definitely see it within my lifetime," Kessler said. "I think that's absolutely where it's headed."

HIS BIGGEST CHALLENGE THIS YEAR:

Like many others, Kessler said his biggest challenge this past year has been dealing with the coronavirus pandemic. But Kessler not only had to deal with the pandemic's effect on his work-life balance, he also had to help player unions representing thousands of professional football, baseball and basketball players strike new deals governing how players would be protected as owners pushed for a quick return to the field.

"Each set of negotiations — for the NFL, NBA and MLB player unions — was very complicated and deeply personal for all of the players," Kessler said. "It really was an unprecedented situation, involving aspects of three collective bargaining agreements that had never really been dealt with before in professional sports."

"In football we had health and economic challenges," the attorney said. "We were able to work with the league to create a system of daily testing protocols to ensure player safety and an option for players not to play and still get paid, among many other things."

"In the NBA we had similar challenges, and we had to work out the details of the bubble, which was very unique and which the players took great pride in. The NBA was also unique because most of the games for that season had already been played. So the economic hit for the NBA this year was not as bad as other sports, but going forward the toll on the league's revenues will be more apparent."

Kessler said many of the same issues came up in the MLB negotiations, as well as the issue of whether the shortened 2020 season would count toward a player's years of service, an essential factor in determining when players are eligible for free agency.

At the same time, players in all three sports wanted to be allowed to show vocal support for the ongoing Black Lives Matter movement and not be penalized for it. Kessler said those negotiations were also wrapped up in the broader COVID-19 talks.

WHAT HE THINKS THE LONG-TERM IMPACT OF COVID-19 ON PROFESSIONAL SPORTS WILL BE:

"In general, I think the pandemic has increased player empowerment and given them more leverage when negotiating with the other side," Kessler said. "Something positive that's emerged from the pandemic is a renewed focus on the fact that players are putting their health and safety on the line every time they step out onto the field, and they want to have that recognized and be compensated accordingly."

"And the fact that issues of social and racial justice came to the forefront during the pandemic as well, I think that helped the players to see how they could negotiate from a position of strength in terms of

their desire to weigh in on those issues," he added. "I think the owners responded in ways in which they wouldn't have previously. Just look at the way the NFL reacted this year compared with how they treated Colin Kaepernick."

HIS PROUDEST MOMENT THIS YEAR:

Kessler said the work that made him the proudest this year was representing double-amputee championship runner Blake Leeper in his bid to be allowed to compete against able-bodied athletes. Leeper was originally denied permission to compete in the 2020 Tokyo Olympics over the summer, but when those games were pushed back by a year due to the pandemic, Leeper was given another shot.

Kessler said he, Leeper and the rest of the legal team recently endured a "brutal, two-day-long proceeding" before the Court of Arbitration for Sport. He expects a decision to be made in that appeal any day now.

"I'm going to be either extremely happy or extremely disappointed," Kessler said. "I think it's a very important fight with Blake, to stand up for not just himself but for all disabled athletes in a situation that should've been resolved by the Oscar Pistorius case."

Pistorius, another champion double-amputee runner, made history as the first disabled runner who secured permission to compete against able-bodied challengers in the 2012 Olympics. Kessler also worked on the case that allowed Pistorius to do so.

WHO HE THINKS WILL WIN THE SUPER BOWL:

"I'm going to go outside the box and predict an upset by the Rams," Kessler said. "However, I'm usually wrong, so I would not suggest anybody follow my predictions."

— As told to Ryan Boysen

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